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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

RELIABLE TRANSFER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A) is reported at 497 F. 2d 1036. The memorandum and order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1974 (Pet. App. C). On August 13,

1974, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Marshall to and including October 1, 1974. The petition for a writ of certiorari was filed on September 30, 1974, and was granted on November 18, 1974 (A. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admiralty rule currently applied in collision cases of dividing damages equally where both parties are found to have been at fault should be replaced by a rule dividing damages in proportion to fault.[1]

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[1] In its brief in opposition to certiorari, respondent sought to raise an additional issue of a factual nature concerning the negligence of its vessel, the *Mary A. Whalen* (Br. in Op., p. 2). The Government's position below with regard to the issue of the parties' relative fault was that the fact that the Rockaway Point breakwater light was inoperative was not a causative factor in the *Mary A. Whalen's* running aground since the evidence at trial showed that the captain and crew of the vessel had actual knowledge of the light's condition some thirty minutes before the accident (Pet. App. B, p. 14). The Government does not have the duty affirmatively to guide the mariner, but only the duty not to mislead him through engendering reliance on an extinguished aid. *Indian Towing Co.* v. *United States*, 350 U.S. 61. Thus, the actual knowledge of the defective aid on the part of the captain and crew of the vessel negates any reliance on the aid and supports the conclusion of the lower court as to fault on the part of the *Mary A. Whalen.*

It is clear, however, that no issue concerning the parties' relative fault is properly before the Court. While the Government does not accede to the lower courts' conclusion on the issue of liability, the Government chose not to petition on this

STATEMENT

The *Mary A. Whalen*, owned by respondent Reliable Transfer Co., left Constable Hook, New Jersey, in gale winds and heavy seas on the evening of December 23, 1968, bound for Island Park, New York. Her planned passage led across New York Harbor and the Lower Bay to Coney Island Channel; southerly from Coney Island Channel through Rockaway Inlet; and east from Rockaway Inlet over open seas to East Rockaway Inlet and journey's end at Island Park (Pet. App. B, pp. 12-13).

The Rockaway Inlet is only 400 yards wide and lies between a breakwater to the east and the shore to the west. The breakwater is marked at its southern terminus by the Rockaway Point breakwater light, which is maintained by the Coast Guard and on most occasions is visible for four miles. On the night of the *Mary A. Whalen's* ill-fated journey, this light was out. Approximately thirty minutes before the vessel's grounding, the captain and one of the two crew members saw that the breakwater light was not operating. The captain pointed out the con-

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basis and respondent, having chosen not to file a cross petition for certiorari, may not now challenge the lower courts' findings with respect to its negligence. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191. The findings in this case concerning relative fault were concurred in by both lower courts. In those circumstances, review in this Court is foreclosed by respondent's inability to make "a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde, Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

dition of the light to the other crew member at that time (*id.* at p. 14).

The tide was at flood and the waves, convulsed by gale winds, were eight to ten feet high when the captain of the *Mary A. Whalen*, while negotiating the Rockaway Inlet, negligently maneuvered to pass a fast-moving barge ahead of his vessel. Failing to overtake the barge, the captain made a U-turn without proper precaution, passed behind the barge and set off on an easterly course. A minute thereafter an object came into view before his craft. This proved to be the Rockaway Point light structure on the breakwater. Swerving to avoid the rocks, the captain ran the *Mary A. Whalen* aground (*ibid.*).

Respondent filed suit against the United States in the district court pursuant to the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. 1346, *et seq.*, seeking to recover for damages sustained by the *Mary A. Whalen* by reason of the grounding (A. 8). The district court found that the grounding was caused 25 percent by the Coast Guard's failure to maintain the breakwater light and 75 percent by the captain's negligence in failing to check his position before setting his vessel on a new course in a channel he knew to be dangerous (Pet. App. B, p. 20). On the issue of comparative fault, the court found in part that

> [t]he fault of the vessel was more egregious than the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow

> space between bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. * * *
>
> Equipped with look-out, chart, searchlight, radio-telephone, and radar, he made use of nothing except his own guesswork judgment. * * * The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. [*Id.* at p. 19.]

The court held, however, that the admiralty rule of divided damages dictated that each party bear one-half of the losses, noting that "[w]hile division of damages in proportion to the degrees of fault may be more equitable, it appears to be forbidden by controlling precedent" (*id.* at p. 22).

The court of appeals affirmed the factual findings of the district court, noting that "[t]he vessel's claim that it was not at fault borders on the frivolous * * *" (Pet. App. A, p. 10). On the issue of the proper division of damages, the court of appeals stated that while it "recognize[d] the force of the argument that in this type of case division of damages in proportion to the degree of fault may be more equitable," it felt compelled "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress" (*id.* at p. 11).

SUMMARY OF ARGUMENT

This case presents in clear and uncomplicated form the important question of whether the American admiralty rule of equally-divided damages should be

overruled. In general, the rule provides that in collision cases involving mutual fault the damages must be divided evenly without regard to the parties' respective degrees of fault. The historic antecedents of the rule may be traced to the ancient laws of France and England, although the conditions which originally justified the rule have long since disappeared. Consequently, the rule has now been abrogated in every major maritime nation—with the exception of the United States. The continued vitality of the rule in this country has been almost universally criticized, by doctrinal writers, major admiralty courts and by most of those directly affected by application of the rule.

This Court granted certiorari in *Union Oil Co. of California* v. *The San Jacinto*, 409 U.S. 140, principally to reconsider the appropriateness of the rule but failed to reach the issue when a finding was made absolving one of the vessels from fault. The present case squarely presents the issue for resolution.

ARGUMENT

THE RULE OF DIVIDED DAMAGES HAS OUTLIVED ITS USEFULNESS AND SHOULD BE REPLACED BY THE MORE EQUITABLE PROPORTIONAL FAULT RULE

A. The Historic Antecedents of the Divided Damages Rule No Longer Justify the Rule's Application in the United States

The divided damages rule had its genesis at a time when the law had not yet developed the practice of founding liability upon negligence.[2] The earliest known codification of the rule is in Article XIV of the Laws of Oleron, which were first published in the thirteenth century and are generally considered to be the most direct precursors of English admiralty law.[3] Article XIV of the Laws of Oleron provided that in cases of collision involving a ship at anchor and one under way, the resulting damages were to be shared equally between the two ships—provided that the captain and crew of the ship under way swore upon their oaths that the collision had occurred accidentally.[4] Apart from being inapplicable to cases of purposeful collision, therefore, the rule had nothing whatever to do with fault. Instead, the rule was intended to operate solely as a risk-sharing device.[5]

While the relevant historical evidence is sparse, it is generally thought that the Laws of Oleron were applied from the thirteenth through the sixteenth centuries in the local maritime courts which sat in the seaport towns of England.[6] For much of this

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[2] The notion of tying civil liability to negligence was unknown in the medieval common law. 8 Holdsworth, *A History of English Law* 266-269 (1931).

[3] Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304, 306 n. 16 (1957).

[4] An English translation of the Laws of Oleron may be found in 30 Fed. Cas. 1171-1187.

[5] Staring, *supra*, 45 Calif. L. Rev. at 306.

[6] The Roll De Superioritate Maris et Jure Admiralitatis Angliae of 12 Edw. 3 (1338) refers to "La Ley Oleyroun" as the law of the English Admiralty. Marsden, *Collisions at*

time they were no doubt equal to the maritime problems which arose.[7] They made no provision for collisions involving more than one moving ship, however, and as seaborne commerce expanded the rules necessarily required augmentation.

In both England and France the divided damages rule was extended during the seventeenth century to cover maritime collision cases characterized as involving either "inevitable accident," where neither vessel was to blame, or "inscrutable fault," where blame could not be determined. It was also applied, particularly during the first half of the century, to cases in which the collision had been caused by the "sole fault" of one of the ships. Application of the rule during the seventeenth century was hardly consistent, however, in large part because of the contemporaneous development of negligence concepts in the law generally and the difficulty of harmonizing the divided damages rule—and especially its application to "sole fault" situations—with these nascent concepts. Thus, as the seventeenth century drew to a close and the eighteenth century began, the original

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Sea 152 (10th ed. 1953). The Laws of Oleron were cited as authority by the parties in *Pilk* v. *Venere*, 23 Edw. II (1350), a case removed to the Chancery from the Bristol Tolsey Court. Selden Society, *Select Cases Concerning the Law Merchant A.D. 1239-1633*, Vol. 46, xcv-xcvi (1930).

[7] One of these problems was the apparently widespread practice engaged in by the owners of old and worthless vessels of anchoring those vessels in the path of on-coming ships, with the intention of collecting full damages. Cleirac reported that the divided damages rule was first applied to deter this practice. Cleirac, *Us et Coustumes de la Mer* 66 (Bourdeaux, 1661).

rationale of the divided damages rule was undergoing substantial erosion. Because of this, it has been suggested that the rule "barely survived to pass into modern jurisprudence * * *."[8]

During the first half of the eighteenth century the appropriateness of basing liability upon negligence, when that could be determined, had become sufficiently accepted that damages were seldom divided in collision cases whenever one of the vessels was found to have been in "sole fault." The rather consistent practice, in England at least, was instead to restrict application of the rule to three categories of cases: (1) those found to have been an "inevitable accident," (2) those involving "inscrutable fault," and (3) those involving "mutual fault." For reasons which are not clear, the records of the English admiralty courts do not contain any cases decided during the period from 1746 to 1789 in which a division of damages was ordered—although the reports reveal that the practice during the last two decades of the eighteenth century was generally consistent with the practice which had prevailed during the first half of the century.[9]

By the end of the eighteenth century, the necessity of establishing negligence as a trigger for liability

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[8] Staring, *supra*, 45 Calif. L. Rev. at 308. The history of the rule of divided damages in the decisions of the English admiralty courts is superbly set forth by Marsden in his *Collisions at Sea*, *supra*, at 138-149, as well as in his introduction to Volumes 6 and 11 of the Selden Society's *Select Pleas in the Court of Admiralty* (1894).

[9] Staring, *supra*, 45 Calif. L. Rev. at 309.

had become firmly imbedded in English jurisprudence.[10] As noted above, the patent inconsistency of negligence doctrine with application of the divided damages rule to collisions attributable solely to the fault of one of the vessels was perceived early in the eighteenth century. At the same time, the introduction of negligence into admiralty law also ran counter to admiralty's practice of ordering a division of damages in "inevitable accident" situations. By the end of the eighteenth century, the latter problem in particular had made a further reexamination of the divided damages rule almost inevitable.

When that reexamination came, in *The Woodrop-Sims*, 2 Dods. 83, 165 Eng. Rep. 1422, it swept beyond the reach of the divided damages rule in English admiralty law not only collisions aptly characterized as "inevitable accidents" but also those in which the locus of the fault could not be determined (so-called "inscrutable fault" cases). In *The Woodrop-Sims*, decided in 1815, Lord Stowell (then Sir William Scott)—in dicta which has since become famous—divided maritime collisions into four categories: (1) collisions solely the fault of the plaintiff's vessel, (2) collisions solely the fault of the defendant's vessel, (3) collisions attributable to the fault of both, and (4) collisions attributable to the fault of neither. According to Lord Stowell, an equal division of damages was appropriately ordered only in cases in which both vessels were at fault. 2 Dods. at 85, 165 Eng. Rep. at 1423.

[10] 8 Holdsworth, *History of English Law* 453-459 (1931).

This dictum became the law of England nine years later. In *Hay* v. *LeNeve*, 2 Shaw Sc. Ap. Cas. 395, a mutual fault collision case, the House of Lords reversed a Scottish court which had apportioned damages according to fault and, primarily on the basis of *The Woodrop-Sims*, ordered that the damages be divided equally. The rule of divided damages was followed in England in cases of mutual fault, although not without substantial criticism,[11] until the proportional fault rule of the Brussels Collision Liability Convention was adopted in 1911.[12]

Since American courts were generally quite familiar with the development of English jurisprudence, the divided damages rule was probably applied in America at the close of the eighteenth century and the beginning of the nineteenth in much the same form as it was being applied in England. The first reported American case containing a statement of the rule was not decided, however, until 1836. In *Ralston* v. *The State Rights*, 20 Fed. Cas. 201, the court stated that damages were generally equally divided in America in cases of mutual fault. But the court did not apply the rule to the case before it because it found that the negligence of only one of the vessels had

[11] Lord Denman, for example, characterized the divided damages rule as "arbitrary" and "not as dictated by natural justice" in *De Vaux* v. *Salvador*, 4 Ad. & El. 420, 431-432. See also, *The Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795, 799, 819, where both Lord Selborne and Lord Blackburn criticised the rule.

[12] 1 & 2 Geo. 5, c. 57 (1911). See discussion, *infra*, at pp. 26-31, 32-33.

caused the collision for which damages were being sought. *Id.* at p. 208. In *Strout* v. *Foster*, 1 How. 89, 92, the Supreme Court cited with apparent approbation the divided damages rule as stated by Lord Stowell in *The Woodrop-Sims*, *supra*, but again refused to apply it because the case before it was one of sole fault.

In 1854 this Court was finally presented with a mutual fault case and the issue of the liability rule appropriately applied to such cases. In *The Schooner Catharine* v. *Dickinson*, 17 How. 170, 177, the Court stated that "[t]he rule that prevails in the district and circuit courts, we understand, has been to divide the loss. * * * This also seems to be the well-settled rule in the English admiralty." The Court then held, without any extended analysis of the rule's implications or of possible alternatives, that

> [u]nder the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation. [*Ibid.*]

Since 1854 the divided damages rule has often been invoked by this Court to govern mutual fault collision cases,[13] as well as cases such as the present in which a vessel has gone aground.[14] While the

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[13] *E.g.*, *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597; *The Eugene F. Moran*, 212 U.S. 466; *The North Star*, 106 U.S. 17.

[14] *E.g.*, *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341.

Court's opinion in *The Schooner Catharine* does not provide much insight into the rationale for the rule's application to cases of mutual fault, subsequent cases make it clear that the Court's decision rested upon two distinct bases. In *The Max Morris*, 137 U.S. 1, for example, this Court plainly stated that the rule was founded "upon the difficulty of determining, in [mutual fault collision] cases, the degree of negligence in the one and the other." *Id.* at p. 12. In the same case, the Court noted with approval the improvement worked by application of the rule upon the common law principle barring recovery to one contributorily negligent, thus suggesting that the characterization of the divided damages rule in *The Schooner Catharine* as "most just and equitable" reflected dissatisfaction with the common law contributory negligence bar. Accord *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 111.

As should be clear from this brief sketch of the history of the divided damages rule, much of the rule's vitality over time can be explained simply in terms of the rule being better, more equitable than readily perceived alternatives. When originally applied, the rule represented an obvious step forward for a system of jurisprudence in which the idea of tying liability to negligence was unknown. The ultimate acceptance of negligence, however, deprived the divided damages rule for a time of coherent and demonstrable rationale. That rationale was provided, and the continued vitality of the rule ensured, by at least two factors: first, judicial disaffection with

contributory negligence and, second, the experience of courts with the rule had shown that it was easy to apply.

But these factors hardly justify the continued application of the divided damages rule in the United States. While the common law doctrine of contributory negligence worked injustice by placing the entire burden upon one of the parties at fault, the equal division rule is not much better; for it often inflicts upon an individual more harm than he deserves.[15] Similarly, while requiring trial courts to assess blame and to apportion liability accordingly may have involved at one time too ambitious an undertaking, the experience gained by courts in this country during the last fifty years in applying proportional fault rules has made that clearly not the case today.[16]

B. The Divided Damages Rule Is Inequitable in Those Cases in Which Fault Is Not Equally Divided

While the divided damages rule was adopted by this Court in order to effect a more equitable distribution of the losses among wrongdoing ships than permitted by the common law, which forbade recovery to the contributorily negligent, it at best brought into the law a roughhewn form of justice. For almost fifty years following the rule's adoption by this Court in The *Schooner Catharine* v. *Dickinson*, *supra*, the rule was applied in the United States by

[15] See discussion, *infra*, at pp. 14-17.

[16] See discussion, *infra*, at pp. 34-36.

simply adding the total damages sustained and then dividing that sum equally between the parties—without any regard whatever to the parties' relative fault.[17] The harshness of the rule in cases of widely disparate fault was eased somewhat by this Court's creation of the "major-minor fault" exception,[18] but even in its present form the rule metes out inequitable results in the vast majority of cases to which it is applied and seems woefully out of place in any modern system of admiralty law.

The rule's capacity for producing harsh results is perhaps most vividly illustrated in those cases in which one of the vessels involved was in violation of a statutory rule of navigation at the time of the collision. This Court has held that in those circumstances the vessel guilty of the statutory violation must prove "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been" a contributing

[17] The manner in which damages normally are computed and divided in maritime collision cases covered by the divided damages rule was spelled out in 1873 in *The Sapphire*, 18 Wall. 51, 56, as follows:

> It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. But this rule is applicable only where it appears that both vessels have been injured. If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault.

[18] See discussion, *infra*, at pp. 23-25.

cause. *The Pennsylvania*, 19 Wall. 125, 136. Since the so-called "Pennsylvania rule" was adopted by this Court, a few cases have been reported in which courts have decided that the statutory violation "could not" have contributed to the collision.[19] In most cases, however, the rule has been literally applied and fault has been found.[20] The consequent division of damages in such circumstances has often produced results which are impossible to justify on any rational basis, particularly where one of the vessels has been grossly negligent and has suffered all of the damage while the statutory violation commited by the other vessel has been almost or purely technical.[21]

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[19] *Compania de Maderas, Etc.* v. *The Queenston Heights*, 220 F.2d 120 (C.A. 5); *Seaboard Tug & Barge, Inc.* v. *Rederi A/B Disa*, 213 F.2d 772 (C.A. 1); *The William J. Riddle*, 102 F. Supp. 884 (S.D. N.Y.), affirmed *per curiam*, 200 F.2d 608 (C.A. 2).

[20] *In The New York Marine No. 10*, 109 F.2d 564, 566 (C.A. 2), for example, the court—applying the "Pennsylvania rule"—held that

> [t]he charterer is therefore * * * liable in full if it is held that the absence of a second deckhand was a cause of the accident. Since the absence has been found, and the lack is admitted to be a statutory fault (see 46 USCA §§ 222, 362 and 405) it is presumed that the fault is a contributory cause, and the petitioner must bear the burden that it was not * * * [citing *The Pennsylvania* and other cases]. This burden it has not met, for it is impossible to say that the other deckhand might not have been on duty instead of Costello on the morning of the collision, had there been two deckhands on board.

See also cases cited in Griffin, *The American Law of Collisions* § 202 (1949).

[21] For a partial listing of the numerous federal and state statutes governing navigation, see Jackson, *The Archaic*

The inequity of applying the divided damages rule in cases such as the present should also be obvious. The district court found that 75 percent of the cause of the *Mary A. Whalen's* grounding was attributable to the negligence of the vessel's own captain and crew and that only 25 percent could be attributed to the inoperative condition of the Rockaway Point breakwater light (Pet. App. B, p. 20). This finding was specifically endorsed by the court of appeals (Pet. App. A, p. 10). All of the damage caused by the grounding, moreover, was sustained by the vessel. Yet, under the divided damages rule the Coast Guard is liable for 50 percent of those damages.

C. The Inequity of the Divided Damages Rule Has Been Almost Universally Recognized by Courts and Commentators

The procedures followed in maritime collision cases operate in such a way that much of the inequity of the divided damages rule is insulated from public

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Rule of Dividing Damages in Marine Collisions, 19 Ala. L. Rev. 263, 271-272 (1967). Jackson concludes his discussion of the "Pennsylvania rule" with the following statement:

> Confronted with an ever-growing assortment of statutes, regulations and local ordinances, it is not surprising for a reasonably taut ship to find that she has been condemned by the Pennsylvania rule, even though her navigation may have fully satisfied the test of reasonable prudence. [*Id.* at p. 272.]

scrutiny—including from the bench and bar. Those cases that proceed to trial normally terminate with an interlocutory decree resolving the issue of the parties' respective fault but leaving the amount and division of damages to private agreement or to a special master. In the event one or more of the parties takes an appeal, the predicate is almost always the interlocutory decree, which is appealed under 28 U.S.C. 1292. Since the decree itself as well as the record on appeal are usually devoid of any evidence from which the appellate court could determine the amount and direction of the monetary payment passing between the parties because of the divided damages rule, the pressure from lower courts for abrogation of the rule has been less than should otherwise have been expected.[22]

Despite this relative lack of awareness of the results of applying the rule, in terms of dollars and cents, the lower federal courts have not suffered the rule silently. When confronted with the comparatively rare cases challenging the rule's application, the courts have repeatedly criticized the rule as "unjust and arbitrary,"[23] "illogical,"[24] and "un-

[22] The procedures employed in the trial of maritime collision cases are discussed in Jackson, *The Archaic Rule of Dividing Damages in Marine Collisions*, 19 Ala. L. Rev. 263, 265-266 (1967).

[23] *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F.2d 485, 488 (C.A. 3).

[24] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 317, 321 (C.A. 2).

fair."[25] "An equal division in this case would be plainly unjust," wrote Learned Hand, dissenting in *National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (C.A. 2): "they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving of the ancient

[25] *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F.2d 618, 620 (C.A. 2).

Other decisions critical of the rule include: *Mystic S.S. Corp.* v. *M/S Antonio Ferraz*, 498 F.2d 538, 539 n. 1 (C.A. 2) "The obvious inequities of the 'procrustean' divided-damages rule have been subjected to abundant criticism * * *."); *Petition of Oskar Tiedemann and Co.*, 289 F.2d 237, 241-242 (C.A. 3) ("It seems too bad that the Elna should be tarred with the same stick as the Mission in this case. If we had a rule which divided responsibility in proportion to the negligence of the parties, as is the case in many other countries, we could make an equitable adjustment. But our American rule of even division of the damages makes for some hard cases and this is one."); *In re Adams' Petition*, 237 F.2d 884, 887 (C.A. 2) ("We have frequently called attention to the inherent injustice of this rule.") (*per curiam*); *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (C.A. 2) ("[W]e have no power to divest ourselves of this vestigial relic; we can only go so far as to close our eyes to doubtful delinquencies."); *Luckenbach S.S. Co.* v. *United States*, 157 F.2d 250, 252 (C.A. 2) ("This is a case where the Continental rule of comparative negligence would produce a more just result."); *The City of Chattanooga*, 79 F.2d 23, 24 (C.A. 2) ("It is indeed unfortunate that the faults cannot be apportioned, for that of the libelant's steamer * * * was so gross that upon any just allocation she ought to bear substantially all the loss.") (*per curiam*); *St. Louis-San Francisco Ry. Co.* v. *Motor Vessel D. Mark*, 243 F. Supp. 689, 693 (S.D. Ala.) ("The Court would prefer to apply the comparative negligence doctrine in this case * * *.").

rule which has been abrogated by nearly all civilized nations." [26]

Although most lower courts have felt constrained to follow the divided damages rule, a few have chosen to apportion damages more equitably. The first step in this direction was taken by the Third Circuit Court of Appeals in *The Margaret*, 30 F. 2d 923. In that case, the court initially ordered a 75 percent/25 percent apportionment but retreated to an equal division on rehearing, feeling itself bound by the divided damages rule. In *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, the Second Circuit affirmed without comment the district court's 60 percent/40 percent apportionment of damages.

As recently as 1962, one district court engaged in what could only be characterized as intellectual gymnastics in an effort to avoid the inequity of the divided damages rule. In *N. M. Patterson & Sons, Ltd.* v. *City of Chicago*, 209 F. Supp. 576, 588 (N.D. Ill), the district court, presented with a case involving unequal fault, concluded:

> Thus it is seen that the general interpretation of the Supreme Court cases discussed above has resulted in holdings which, despite grave misgivings, have applied equal division to every type of collision case. As noted by the opinions supporting these holdings, the normal product of applying equal division to cases of unequal fault has been manifest injustice. Certainly, our Supreme Court in first applying the principle never intended to cause such harsh results in the future.

[26] Certiorari denied *sub nom. Burns Steamship Co.* v. *National Bulk Carriers, Inc.*, 340 U.S. 865.

The district court therefore ordered the damages apportioned according to fault.[27]

The lower federal courts have also indicated their displeasure with the principle of divided damages by using the proportional fault rule whenever such a course has appeared to be justified by the international character of the case. For example, *The Mandu*, 114 F. 2d 361 (C.A. 2), certiorari denied *sub nom. Great American Insurance Co.* v. *Companhio de Navegacao Lloyd Brasileiro*, 311 U.S. 715, involved a collision in Brazilian waters between two steamships, one German and the other Brazilian. Although the district court divided the damages equally, the Second Circuit reversed, holding that the Brazilian proportional fault rule should apply. *Partenreederei Wallschiff* v. *The Pioneer*, 164 F. Supp. 421 (E.D. Mich.), involved a collision on the Canadian side of the St. Clair River between a German

[27] The court of appeals reversed because it found that the accident had been solely the fault of one of the parties. The court noted, however, that had the accident been caused by the parties' mutual fault, the district court would have been obligated to divide the damage equally. 324 F.2d 254 (C.A. 7).

Other reported cases in which courts have apportioned damages in maritime collision cases in proportion to fault include *The No. 6-H*, 108 Fed. 429 (E.D. N.Y.); *The Mary Ida*, 20 Fed. 741 (S.D. Ala.). See also *McKeel* v. *Schroeder*, 215 F. Supp. 756 (N.D. Calif.); *Tracy Towing Line* v. *City of New Jersey*, 105 F. Supp. 910 (D. N.J.).

motorship and an American steamer. The district court, finding that 95 percent of the fault was attributable to the German motorship, remarked that it was "grateful for the circumstances that this collision happened in Canadian waters," thus enabling the court to invoke the Canadian proportional fault rule. *Id.* at p. 430. The Sixth Circuit affirmed without comment. 287 F. 2d 886. In *Labrador Steamship Co.* v. *M/V EGLE*, 1971 A.M.C. 2344 (N.D. Ohio), a case arising out of a collision in the Canadian waters of the St. Lawrence Seaway, the district court applied Canadian law and allocated damages 95 percent/5 percent, remarking that the "harsh provisions" of American law "would compel an even division of the total damages between the parties, although * * * the plaintiff's damages are more than three times as great as the cross-plaintiffs." *Id.* at p. 2349.

Leading commentators on the law of admiralty have not treated the divided damages rule any more kindly than have the lower federal courts. Gilmore and Black state in their treatise, *The Law of Admiralty* (1957 ed.), for example, that "[i]t is exceedingly hard to see why the rule of divided damages should be thought more likely to 'induce care' than any other rule that penalized negligence." *Id.* at p. 438. They then postulate the case in which one vessel, sustaining most or all of the damage, has been grossly negligent while the other vessel has been in technical but plain fault. The outcome of such a case under the divided damages rule would generally in-

volve a substantial payment by the less negligent vessel to the grossly negligent. According to Gilmore and Black,

> [t]his result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence; actually, in the case supposed, many people might think justice better served by letting all parties walk out of court empty-handed, as the contributory negligence rule would do. [*Id.* at p. 439.] [28]

This Court has implicitly recognized the inequity of the divided damages rule by excluding from cases of mutual fault subject to the rule those in which the fault of one vessel has been "major" and the fault of the other "minor." The first complete statement of this exception appeared in *The City of New York*, 147 U.S. 72, in which the Court stated:

> Where fault on the part of one vessel is * * * of itself, sufficient to account for the disaster * * * any reasonable doubt with regard to the propriety of the conduct of such other vessel

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[28] Other academic criticism includes: Donovan, *Mutual Fault-Half Damage Rule—A Critical Analysis*, 41 Ins. Coun. J. 395 (1974); Allbritton, *Division of Damages in Admiralty —A Rising Tide of Confusion*, 2 Journal of Maritime Law and Commerce 322 (1971); Jackson, *The Archaic Rule of Dividing Damages in Maritime Collisions*, 19 Ala. L. Rev. 263 (1967); Staring, *supra*, 45 Calif. L. Rev. at 304; Mole & Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333 (1932); and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Corn. L. Q. 531 (1928).

> should be resolved in [the other vessel's] favor. [*Id.* at p. 85.] [29]

In practice, however, the "major-minor fault" exception has proven to be vague and unreliable and itself subjects vessels to liability in excess of their fault. In the words of Learned Hand, it is "in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." *National Bulk Carriers*, 183 F. 2d 405, 410. "[O]ne of the merits of * * * permitting damages to be divided on other than an equal basis," Judge Friendly has commented, "is that it avoids the vagaries of the 'major-minor fault rule.'" *Lady Nelson, Ltd.* v. *Creole Petroleum Corp.*, 286 F. 2d 684, 688 (C.A. 2). Judge Maris, in *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F. 2d 485, 488 (C.A. 3), complained:

> Where * * * the fault of one vessel is palpably major and that of the other extremely minor the obvious injustice of the application of the rule of equal division of damages has led the courts to avoid it by glozing and ignoring the minor fault and imposing sole responsibility upon the vessel gravely at fault, as was done in some of the cases upon which the appellant here relies. But to ameliorate the unjust effect of one arbitrary rule by applying another which is equally arbitrary seems hardly the way to promote justice and reach an equitable result. How much better it would be to apply, in cases where it was feasible to do so, a rule of comparative fault analogous to that now applied in the admiralty in cases of personal injuries.[30]

[29] For other formulations of the test for determining "major" and "minor" fault, see *The Victory & The Plymothian*, 168 U.S. 410, 423; *The Oregon*, 158 U.S. 186, 204.

D. The United States Today Stands Alone Among the Leading Maritime Nations in Retaining the Divided Damages Rule

Perhaps the most telling criticism of the divided damages rule is the fact that the United States is today the only major seafaring nation in which damages in mutual fault collision cases are not awarded in proportion to fault.

The isolated maintenance of the divided damages rule by this country has continuing adverse consequences, which exist quite apart from the inequities occasioned in particular cases. These include an unfortunate and unnecessary amount of confusion and unpredictability in maritime commerce and the encouragement of international forum shopping. Gilmore and Black provide the following example. Ships A and B collide, Ship A suffering damages of $100,000 and Ship B suffering damages of $50,000. Ship A is 80 percent at fault. The divided damages rule would require a United States court to add the dam-

[30] See also Staring, *supra*, 45 Calif. L. Rev. at 341 n. 242 ("The courts have so much travail in attempting to determine what is sufficiently minor or major and are so often reversed on this point that it is surprising that proportional damages has not made more headway."); Gilmore and Black, *The Law of Admiralty* 403 (1957 ed.) ("The major-minor fault 'rule' is vague and unreliable * * *.").

ages suffered by the two vessels and to divide them equally, requiring Ship B to pay $25,000 to Ship A. In contrast, a court applying the proportional fault rule would require that a $20,000 payment be made by Ship A to Ship B. The difference of $45,000 makes international forum shopping worthwhile. If the disparity of the potential recovery under the two rules is large enough, moreover, the owners of the vessels often will initiate and attempt to maintain litigation independently of one another, thereby posing difficult problems of comity. Gilmore and Black, *supra*, at 439. See *Petition of Bloomfield S.S. Co.*, 422 F. 2d 728 (C.A. 2); *Isbrandtsen Co.* v. *Lloyd Brasiliero Patrimonio Nacional*, 85 F. Supp. 740 (E.D. N.Y.).[31]

With the exception of the United States, all major maritime nations—including Great Britain, from whom we obtained the divided damages rule, and our neighbors Canada and Mexico—have ratified or adhere to the Brussels Collision Liability Convention of 1910 which provides, in paragraph 1 of Article 4, for the apportionment of damages according to the "degree" of fault in all cases in which it is possible

[31] For a further discussion of these problems, see Sundstrom, *Foreign Ships and Foreign Waters Acta Institutae Upsaliensis Iurisprudentiae Comparativae* 89-125 (Uppsala, 1971); Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions To Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 Yale L. J. 878, 879-893 (1955); and Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Corn. L. Q. 531 (1938).

to do so.[32] The United States was a signatory to the original draft of the Convention, and it was transmitted to the Senate for ratification in April, 1937.[33] After hearings, the Convention was favorably reported out of the foreign relations subcommittee to which it had been assigned. It was then sent to the full Foreign Relations Committee with a letter from Secretary of State Hull strongly endorsing the convention on behalf of the Departments of State and

[32] Article 4, paragraph 1, provides:

> If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it apears that the faults are equal, the liability shall be apportioned equally. 6 Knauth's *Benedict on Admiralty* 39 (7th ed. 1969).

The countries which have ratified or adhere to the Brussels Convention include Argentina, Australia, Austria, Belgium, Brazil, Canada, Danzig, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Mexico, Newfoundland, New Zealand, Netherlands, Nicaragua, Norway, Poland, Portugal, Romania, U.S.S.R., Sweden, Switzerland, Turkey, Uruguay, and Yugoslavia. Knauth, *supra*, at 38-39.

[33] The 27 year delay in submitting the Convention to the Senate for its advice and consent was due to several factors, among them opposition from the cargo underwriters, the outbreak of World War I and the decision of President Hoover to hold submission of the Convention in abeyance until other similar conventions, then under consideration, were also ready to be submitted to the Senate. See Hearings before Senate Subcommittee on Foreign Relations on Rules to Govern the Liability of Vessels When Collisions Occur Between Them, 75th Cong., 3d Sess. 76-77.

Commerce and the Maritime Commission.[34] The coming of World War II stayed Congress' hand, however; and in April, 1947, President Truman withdrew the Convention as well as 18 other unratified treaties from the Senate's calendar.[35]

The Senate hearings reveal that adoption of the Convention was vigorously opposed by representatives of American cargo interests and by the Marine Law Association.[36] Their criticism, however, was directed principally at Article Four, paragraph two, which eliminated the joint and several liability of vessels for cargo damage.[37] Cargo interests contended that such a fundamental charge in their right to recovery should be effected, if at all, by regular legislative processes and not by treaty ratification. Concern was also expressed over Article Six, which eliminated legal presumptions of fault with respect to liability for

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[34] The letter is printed in 1939 A.M.C. 1068.

[35] 16 Department of State Bulletin 726 (1947).

[36] For a detailed discussion of the opposition of cargo interests to the Convention, see Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Convention To Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 Yale L. J. 878 (1955).

[37] Article Four, paragraph two, provides:

> The damages caused either to vessels or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties. [Knauth, *supra*, at 39.]

collision. Little objection to the proportional fault rule itself was voiced.[38]

In 1961 the Maritime Law Association reversed the position which it had adhered to for fifty years and endorsed the basic principles of the Collision Convention, recommending congressional adoption.[39] The following year, the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce held hearings on S. 2314, domestic legislation designed to implement the Collision Convention.[40] The American Bar Association, which in 1929 opposed congressional ratification of the Convention, reversed its position and strongly urged passage of the new bill, noting that "[t]he rest of the world has long recognized that liability should be proportionate to fault * * *."[41] Similar statements of support of the legislation came from the Maritime Law Association, the American Merchant Marine Institute, and trade associations serving American vessels involved in domestic and foreign trade, as well as from the

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[38] Two opponents of the Convention predicted that the proportional fault rule would be difficult to administer. Hearings, *supra*, at 182, 204.

[39] Maritime Law Association of the United States, Document No. 450 (October 23, 1961).

[40] Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on S. 2313 To Unify Apportionment of Liability in Cases of Collision Between Vessels, and Related Casualties, and S. 2314 To Limit the Liability of Shipowners, and for Other Purposes, 87th Cong., 2d Sess.

[41] *Id.* at p. 27.

Maritime Administration, and the Departments of State, Commerce and the Treasury. Although some criticism of the bill was voiced, it was directed at provisions other than the proportionate fault rule, which was uniformly endorsed. The legislation was reported out of committee favorably, but the Eighty-Seventh Congress adjourned in 1962 without taking further action.[42]

The failure of Congress in the years following completion of the Brussels Convention to consider the proportional fault rule, for which there is almost unanimous support, independently of other provisions of the Convention, to which there is substantial opposition, only confirms the appropriateness of this Court's adoption of the rule. The initial and continued application of the divided damages rule in this country is wholly a function of decisions of this Court; abrogation of the rule would simply be in recognition of the fact that its continued application is anomalous and inequitable and that, since Congress has been unable to act on this matter, the responsibility for the rule has remained with this Court. Finally, it should be noted that adoption of the proportional fault rule by this Court would not prejudice

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[42] Similar legislation was introduced in 1963. Hearings were again held, but the Eighty-Eighth Congress adjourned without acting. See Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on S. 555 A Bill to Unify Apportionment of Liability in Cases of Collision Between Vessels, and in Other Maritime Casualties, and S. 556 A Bill to Limit the Liability of Shipowners, and for Other Purposes, 88th Cong., 1st Sess.

future consideration by Congress of other provisions of the Brussels Convention and their eventual approval or disapproval.

E. There Are No Impediments To Adoption of the Proportional Fault Rule by This Court

Adoption of the proportional fault rule by this Court to cover mutual fault collision cases in which the parties' respective degrees of fault can be determined would not create any inconsistencies or anomalies in the law generally, or defeat the intent of other related rules in American admiralty law. Neither would application of the proportional fault rule to cases such as the present upset settled expectations, encourage litigation or create confusion. It would, on the other hand, bring this important aspect of American admiralty law into line with the rules prevailing elsewhere in the world. The experience of other countries with the proportional fault rule has demonstrated beyond dispute that the rule can be feasibly and equitably administered. This Court has traditionally entertained a broad discretion in admiralty to fashion rules which fairly balance competing interests. This discretion should be exercised in the present case.

1. *Adoption of the Proportional Fault Rule Would Not Create Disharmonies with Other Areas of Law*

Gilmore and Black conclude their discussion of the divided damages rule with the statement that "[t]he abrogation of the rule would not, it seems,

produce any disharmony with other branches of the maritime law, general or statutory." Gilmore and Black, *supra*, at 442.

As noted above, Congress' failure to ratify the Brussels Convention has been due in large part to opposition to the Convention by cargo interests. But this opposition has not been directed at the proportional fault rule, and it is not believed that cargo interests would oppose adoption of the rule by this Court to cover cases such as the present. Under American law, cargo presently has the right to full recovery for damages sustained in maritime collisions if two or more vessels are involved and the non-carrying vessel is found to have been at fault, even if that fault has been minor when compared to the fault of the carrying vessel.[43] This principle was established by this Court in *The Alabama and The Game-cock*, 92 U.S. 695, which held specifically that the immunity from liability for damage to cargo enjoyed by carrying vessels under the Harter Act, 46 U.S.C. 190, *et seq.*, and the Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.*, did not extend to non-carrying

[43] Although this formulation assumes a maritime collision involving two vessels, a carrying vessel and a non-carrying vessel, it is well settled that the same principle applies to cases such as the present. Had the stranding of the *Mary A. Whalen* resulted in damage to its cargo, the Government could have been held fully liable for such damages even though the fault of the Coast Guard was found to have been only a relatively minor contributing factor in the collision. *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341, 345; *Russell, Poling & Co.* v. *United States*, 140 F. Supp. 890, 893.

vessels whose negligence contributed to the collision in which cargo was damaged.

It has been clear since this Court's decision in *The Chattahoochee*, 173 U.S. 540, however, that the statutory immunity of carrying vessels from liability to cargo does not override generally-accepted contribution principles. Under the rule announced in *The Chattahoochee*, cargo may recover its full damages in mutual fault collision cases from the non-carrying vessel. But the non-carrying vessel may in turn require a contribution of one-half of that amount from the carrying vessel. Carrying vessels have not been permitted to escape such liability by writing indemnification clauses into bills of lading. *United States* v. *Atlantic Mut. Ins. Co.*, 343 U.S. 236.

Adoption by this Court of the proportional fault rule to govern cases such as the present would not affect cargo's right to recover in any of the circumstances described above. Under the proportional fault rule, cargo would still be permitted to recover in full from the non-carrying vessel in mutual fault collision cases—or from the Government in cases such as the present. The only impact of the rule would occur in those cases in which the non-carrying vessel or party seeks contribution from the carrying vessel. In that event, the carrying vessel would be required to contribute to the non-carrying vessel or party in proportion to its own fault.

Adoption by this Court of the proportional fault rule would also not affect the rule of *The Pennsyl-*

vania, supra, which provides that any vessel in violation of a statutory rule of navigation at the time of the collision is presumed to have been guilty of negligence and to have contributed to the accident. This presumption would continue to operate under a proportional fault scheme, unless expressly overruled by this Court. Indeed, to the extent that the vessel guilty of the statutory violation was unable to establish that that violation could not have contributed to the collision the vessel would be liable for its proportional share of any consequent damages.

Finally, it could be argued with some persuasiveness that adoption of a proportional fault rule would make unnecessary the "major-minor fault" exception to liability created by this Court in *The City of New York, supra*. We submit, however, that the possibility of discarding that exception must be counted as one of the important advantages of the proportional fault rule. As noted earlier, the "major-minor fault" exception has proven difficult, if not impossible, to apply in any rational manner and itself subjects vessels to liability in excess of their fault.

2. *The Proportional Fault Rule Can Be Feasibly and Equitably Administered*

Gilmore and Black have stated that the only objection to adoption by this Court of the proportional fault rule with *any* plausibility is the difficulty in collision cases of assigning relative degrees of fault. Gilmore and Black, *supra*, at 440. They quickly discount this objection, however, noting that

> [t]he answer is, of course, that judges would simply approximate, as best they could, as is done every day in other cases in matters of amounts of damages, degree of disability, etc. An attempt at a division on the basis of degree of fault would at least not be foredoomed to go badly wrong in a large number of cases, as is the present rule. [*Ibid.*]

It is important to emphasize in this regard that the Government seeks abrogation of the divided damages rule, and application of the proportional fault rule, only in those cases found to involve disparate degrees of fault. The divided damages rule would continue to be applied in those cases in which fault could not be apportioned between the parties on any rational basis. It is also significant that the countries which have adopted the proportional fault rule have not reported any difficulties in applying it. See Mole & Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333, 348 (1932); *In re Adams' Petition*, 125 F. Supp. 110, 114, (S.D.N.Y.), affirmed, 237 F. 2d 884 (C.A. 2).

Further, it should be noted that this Court has already rejected the application of the divided damages rule in admiralty personal injury cases in favor of proportional fault. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406. Indeed, proportional fault rules have come to occupy so much of tort law, and American judges have become so used to applying them, that an objection to the rule at the present time on grounds of administrative feasibility would be almost frivolous. See, *e.g.*, Merchant Marine ("Jones") Act, 46 U.S.C.

688; Death on the High Seas Act, 46 U.S.C. 766; Federal Employers Liability Act, 45 U.S.C. 53; and Prosser, *Law of Torts* (4th ed. 1971), at pages 435 through 438 for a listing of the many state comparative negligence laws.

We submit in addition that there is no reason to believe that settlements would be impeded and litigation increased were this Court to adopt the proportional fault rule. At best, such an argument in opposition to the proportional fault rule would be highly speculative. Under the present divided damages rule, moreover, the owner of a vessel which is not as extensively damaged in a collision as another vessel has an incentive not to settle since by postponing the day of judgment he also postpones having to pay the owner of the other vessel one-half of the total damages suffered. This incentive is even stronger in cases in which the fault of the relatively undamaged vessel is minor compared to the fault of the other vessel. In the latter class of cases, there is always the possibility of ultimate exoneration from liability under the "major-minor fault" rule. Regardless of the impact of a proportional fault rule on settlements over time, however, we submit that there is a substantial question whether the law of damages ought to be so structured that inequitable settlements, involving an equal division of damages without regard to the parties' respective degrees of fault, are encouraged.

3. *Abandonment by this Court of the Divided Damages Rule Would Be In Keeping With Its Traditional Willingness in Admiralty Cases To Break With Custom In Order To Secure a More Equal Distribution of Justice*

This Court has long affirmed that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the sound discretion of the courts. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409; *The Palmyra*, 12 Wheat. 1, 9-10; *The Marianna Flora*, 11 Wheat. 1, 24-25. A particularly instructive example of this refusal to be bound by custom where justice dictates a contrary result is presented by this Court's decision in *Moragne* v. *States Marine Lines*, 398 U.S. 375.

The petitioner in *Moragne* had brought suit in federal court seeking to recover damages for the wrongful death of her husband, a longshoreman. The suit had been dismissed by the district court, and the dismissal affirmed by the court of appeals, because of the absence of any state statutory right of action and because this Court had held in *The Harrisburg*, 119 U.S. 199, that federal maritime law does not afford a cause of action for wrongful death. In reversing dismissal of petitioner's suit, this Court first reviewed the historic antecedents of *The Harrisburg* and concluded that the holding in that case had never had much more to recommend it than "primitive English legal history." 398 U.S. at 379. On the other hand, the Court noted that the policies favoring the existence of such a cause of action were substantial and that it was "of major significance" that since

The Harrisburg was decided the rule against recovery for wrongful death had been abandoned in most areas of the world—including in England. The Court then stated that the crucial threshold question was whether any act of Congress had given an "affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* at p. 393. Since the Court concluded that no act of Congress could be so construed it overruled *The Harrisburg* and in effect created for the first time in federal maritime law a remedy for wrongful death. In explaining its decision, the Court stated in part that

> [w]e do not regard the rule of *The Harrisburg* as a closely arguable proposition—it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and * * * has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today. [*Id.* at 404-405; footnote omitted.]

In a similar fashion, the Court should discard the outmoded and inequitable rule of divided damages in collision cases and replace it with a rule awarding damages in proportion to fault.

CONCLUSION

It is therefore respectfully submitted that the judgment below should be reversed.

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